IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

AMDOCS (ISRAEL) LIMITED, an Israeli Corporation, Plaintiff, v. OPENET TELECOM, INC., a Delaware Corporation, and OPENET TELECOM LTD., an Irish Corporation, Defendants.	Case No. 1:10cv910 (LMB/TRJ)

REPLY OF AMDOCS (ISRAEL) LIMITED IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

In their Response, defendants Openet Telecom, Inc. and Openet Telecom Ltd. (collectively, "Openet") do not oppose Amdocs (Israel) Limited's ("Amdocs") motion for leave to file an amended complaint.[1] *See* Dkt. No. 39 (hereinafter, "Response") at 1. Amdocs' motion for leave should therefore be granted.

Instead, Openet's Response seeks (yet again) to achieve through requesting unwarranted procedural bars what it cannot achieve on the merits – avoidance of multiple findings of patent infringement and the issuance of a permanent injunction against future infringement. In its Response, Openet seeks to have unreasonable conditions imposed not only Amdocs' assertion of the '984 and '510 patents at issue in the motion for leave, but also upon Amdocs' enforcement of its rights under the '065 and '797 patents, which have been part of the case since it was filed. Openet is, in essence, asking that Amdocs be required to prove its entire infringement case

[1] Openet's passing assertion that Amdocs' proposed amendment is "untimely" (Response at 1) is unfounded. At the December 22, 2010 Rule 16 Conference, Openet ***agreed*** to January 18, 2011 as the deadline for amendment of the pleadings to add additional patents. Moreover, on the same day Amdocs filed the instant motion, Openet filed its own motion for leave to amend its counterclaims to add allegations of inequitable conduct. *See* Dkt. No. 32. Amdocs does not oppose Openet's motion for leave to file amended counterclaims.

before receiving discovery regarding Openet's products. Openet asks the Court to require Amdocs to select the narrow set of patent claims and full set of Openet products on which it will go forward at trial by ***Tuesday***,[2] despite the facts that:

- Openet has not yet made a single witness regarding Openet's accused products available for deposition;
- Openet will not make its 30(b)(6) witness regarding the design and operation of its accused products available until February 10;
- Openet has yet to provide any substantive responses to Amdocs' interrogatories served ***December 2, 2010*** – including an interrogatory requesting that Openet identify relevant products;
- Openet's documents were produced in an unsearchable (and therefore almost unusable) format in contravention to Federal Rule of Civil Procedure 30, which defect was not corrected until January 21;
- Openet still has not finished making its email production; and
- there are two-and-a-half months remaining in the discovery period.

Indeed, if they are imposed, Openet's conditions are unlikely to streamline this case and instead will create a likelihood that the filing of additional patent infringement actions will be necessary to resolve the parties' disputes. Finally, Openet's assertion that Amdocs has failed to expedite this case is without basis.

IF AMENDMENT IS ALLOWED, AMDOCS WILL SERVE INFRINGEMENT CONTENTIONS WITHIN ONE WEEK

The first condition Openet asks the Court to impose is a requirement that Amdocs serve infringement contentions for the '984 and '510 patents by Tuesday, February 1. That unreasonable request should be denied, particularly where Openet did not confirm whether it would consent or oppose Amdocs' motion for leave until the filing of its "Response" yesterday.

[2] For good measure, Openet demands that its unreasonable and immediate restrictions be placed on Amdocs' case without agreeing to subject itself to like restrictions. As set forth below, to the extent the Court is

If the Court grants it leave, Amdocs plans to provide infringement contentions as to these patents by Friday, February 4 (i.e., within one week). Providing such infringement contentions on February 4, rather than February 1, will not in any way prejudice Openet.

AMDOCS SHOULD NOT BE REQUIRED TO NARROW ITS PATENT CLAIMS PRIOR TO DISCOVERY

The second condition Openet seeks to place on Amdocs is that, by Tuesday, Amdocs identify "no more than four claims per patent" that it will assert at trial, and that this condition be placed on all of the patents in suit, whether added by amendment or not. Response at 2. If similar limitations are placed on Openet's invalidity contentions (which currently apply 26 separate alleged prior art references to the claims, and have identified approximately 150 references as "relevant"[3]), Amdocs is not opposed to limiting the number of claims for trial to four per patent, nor to narrowing the case early. The timing proposed by Openet however, (*i.e.*, this Tuesday) is illogical. If the Court determines to impose this rule (which Amdocs does not believe necessary at this time), the parties should be required to narrow their respective cases by February 28, not February 1.

To date, Openet has not made a single witness available for deposition, and it is not making its 30(b)(6) witness on the design and operation of the accused products, Joe Hogan, available until February 10. Mr. Hogan's and the other Openet employees' testimony will likely inform Amdocs' determination as to which claims should be pressed at trial. Amdocs should not be required to select which claims it will assert at trial without first having the opportunity to depose these witnesses.

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inclined to impose restrictions on Amdocs' case at this time, Amdocs respectfully requests that Openet have corresponding limitations imposed upon it.

[3] *See* Ex. 1.

Likewise, Openet has not yet completed its document production, and has not indicated that its document production will be completed this week. Again, requiring Amdocs to select its preferred "four claims" without the opportunity to review Openet's documents would be unfair and contrary to the purposes of liberal discovery under the Federal Rules.

Amdocs agrees, however, that the parties should narrow the case at a reasonable time, after they have had an opportunity to take adequate fact discovery. However, such narrowing should not be one-sided and limited to Amdocs. Just as it is clear that Amdocs will not present all of the claims of the asserted patents to the jury, Openet clearly will not present 26 pieces of prior art at trial (much less the 150 it has identified as "relevant" to the validity analysis). Therefore, at the time that Amdocs limits the claims it is asserting to four per patent, Openet should be required to limit the number of prior art references it is asserting to four per patent. If Openet believes that this narrowing should take place prior to the submission of expert reports (which appears to be the case), Amdocs believes that February 28 would be a reasonable date because at that point the parties will have had their email productions completed and the majority of the depositions will have been taken. Amdocs also believes that the parties can reach an agreement on these disclosure issues without the Court's intervention.

AMDOCS IS ENTITLED TO DISCOVERY ON OPENET'S PRODUCTS

Openet next argues that Amdocs should be required – again, by Tuesday, and for the existing patents in suit as well as the patents Amdocs seeks to add – to serve infringement contentions that identify each of the accused products and supplies a claim chart identifying citations to the specific evidence of infringement as to each. Response at 2. Amdocs' infringement expert report, due March 11, will provide this information. Openet's request that it be provided on Tuesday, however, is unjustified for at least the following reasons.

First, Openet has yet to provide ***any*** responses to Amdocs' December 2, 2010, interrogatories.[4] Those responses were due over three weeks ago, on January 3, 2011. Among other things, Amdocs' interrogatories called for an identification of the software and other products made by or for, used, sold, or offered for sale by Openet built on the accused FusionWorks framework, and those products that have substantially the same structure or operate in substantially the same way. Ex. 2 at 4-5. Amdocs cannot reasonably be required to select all of the products against which it will assert infringement at trial before Openet has even identified the relevant products. In its Response, Openet seeks to gain from its own failure to comply with the Federal Rules by asking the Court to require Amdocs to narrow its infringement contentions without the benefit of this discovery and appropriate follow-on discovery. The Court should not assist it in doing so.

Second, as set forth above, Openet has yet to make any witness available for deposition regarding its products, and Openet is not making its corporate witness on the design and operation of the accused products available until February 10. Openet does not provide any support for a ruling that would require Amdocs to limit its infringement contentions before obtaining that discovery.

Third, Openet's proposal would not, as Openet claims, "streamline" discovery in this case and, to the contrary, would likely create multiple lawsuits. Even if required to provide detailed evidentiary charts regarding the accused products and asserted claims now, Amdocs would presumably still be entitled to take discovery regarding other products and other claims to

[4] Openet provided objections, but not responses, to Amdocs' December 2 interrogatories on December 17, 2010. *See* Ex. 2. In those objections, Openet committed to provide information regarding its products that were on sale after August 16, 2010. *E.g.*, *id.* at 5. Openet later withdrew its objection to providing information on products on sale prior to September 2010, but has not yet provided any responses. On January 25, in response to an inquiry from Amdocs, Openet stated it would provide responses on January 27, 2011.

determine whether they should be asserted or accused in this case. If Amdocs were precluded from taking discovery of and/or asserting its infringement claims as to all Openet products in this case, Amdocs would be entitled to file a second lawsuit as to the remaining infringing products. *See, e.g.*, *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1326 (Fed. Cir. 2008) (holding that subsequent infringement action on same patent is not barred where accused products are not "essentially the same," and that claim preclusion does not bar subsequent action simply because claim could have been brought in prior proceeding) (citations omitted); *Foster v. Hallco Mfg. Co., Inc.*, 947 F.2d 469 (Fed. Cir 1991) (holding subsequent action on infringement of different products not barred). The same would be true of any patent claims that Amdocs was prevented from asserting in this case by operation of Openet's proposed conditions, as each patent claim raises distinct issues of infringement and validity. *Cf. Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1324 (Fed.Cir.1987) ("a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action"*)* (quoting *Cromwell v. County of Sacramento,* 94 U.S. (4 Otto) 351, 356 (1876)). Thus, to minimize the likelihood of multiple patent infringement lawsuits between the parties, the Court should not impose Openet's unreasonable conditions on amendment.

AMDOCS HAS NOT 'FAILED TO EXPEDITE' THIS LITIGATION

For the second time in as many filings (*see* Dkt. No. 36), Openet asserts that Amdocs has "failed to expedite" this litigation. That accusation has no basis. Indeed, Openet is the only party who has failed to meet a discovery deadline (and there it has failed to meet that deadline by over three weeks), and is also the party that engaged in gamesmanship prohibited by the Federal Rules of Civil Procedure by artificially rendering its own document production unsearchable.

See Federal Rule of Civil Procedure 34, comment to 2006 amendments ("If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.").

Contary to Openet's assertion that it has failed to expedite this case, Amdocs

- served its discovery requests on December 2, 2010 – the day after the Court authorized the parties to begin discovery;
- has already produced over 250,000 pages of searchable non-email files;
- is in the process of producing hundreds of thousands of additional pages of searchable email files, which process will be completed shortly;
- has provided dates for all depositions requested by Openet, except for two third-parties, whose availability Amdocs expects to provide within the next week; and
- unlike Openet, has made all of its witnesses available for deposition in the United States even though many reside in Israel.

Finally, Openet's suggestion that there was something untoward about Amdocs' decision not to serve the complaint and therefore to engage in discovery immediately upon filing the complaint (*see* Response at 3-4) is meritless. After Amdocs filed its complaint, the parties began to engage in settlement discussions. Ultimately, the parties were not able to reach an agreement, and when further pursuing this litigation became necessary, Amdocs served the complaint. This Court encourages parties to engage in settlement discussions, and there was nothing inappropriate or undesireable about Amdocs holding those discussions before commencing with process and beginning discovery. Openet's repeated attempt to use the fact that Amdocs was willing to engage in settlement discussions rather than immediately press forward with this litigation should not be given weight.

CONCLUSION

For the foregoing reasons, as well as those set forth in Amdocs' memorandum in support of its motion for leave to file an amended complaint, the Court should grant Amdocs' motion. It should not order the unreasonable conditions requested by Openet.

January 27, 2011

Respectfully submitted,

_/s/____________________

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2011, I served the foregoing on the following counsel for Openet Telecom, Inc. and Openet Telecom Ltd. via the court's ECF system, which caused electronic notification to be sent to the following:

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